No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellee.

OPENING BRIEF OF APPELLANT, PACIFIC EMPLOYERS INSURANCE COMPANY.

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OPENING BRIEF OF APPELLANT, PACIFIC EMPLOYERS INSURANCE COMPANY.

Introductory Statement.

This action was brought in the United States District Court for the Southern District of California, Central Division, for declaratory relief to determine the respective liabilities of four insurance companies, under their policies of insurance, because of injuries caused to one Richard D. Carter. The two insurance companies involved in this appeal—the appellant, Pacific Employers Insurance Company, and the appellee, Hartford Accident and Indemnity Company—had insured the William P. Neil Co., Ltd., a corporation. Two other insurance companies, Anchor Casualty Company and United States

Fidelity and Guaranty Company, had insured Minnesota Mining and Manufacturing Company. Motions for summary judgment were granted by the lower court in favor of Anchor Casualty Company and United States Fidelity and Guaranty Company and they are not involved in this appeal.

For convenience, the names of the various corporations involved in this appeal will be shortened and referred to as follows:

Pacific Employers Insurance Company will be referred to as "Pacific."

Hartford Accident and Indemnity Company will be referred to as "Hartford."

William P. Neil Co., Ltd., will be referred to as "Neil Company."

Minnesota Mining & Manufacturing Company will be referred to as "Minnesota Mining Company."

The court below held Hartford and Pacific equally liable under their insurance policies for payment of the sum necessary to settle Richard D. Carter's claim for damages. From this declaratory judgment Pacific, alone, appeals.

Statement of Pleadings and Facts Showing Jurisdiction.

Plaintiff and appellee Hartford by its amended complaint for declaratory relief alleged that:

Plaintiff Hartford is a citizen of Connecticut; defendant Pacific is a citizen of California; Anchor Casualty Company and United States Fidelity and Guaranty Company (whose motions for summary judgment were granted and who are not involved in this appeal) are citizens of

the States of Minnesota and Maryland, respectively; the Neil Company is a citizen of California; the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

The evidence shows that controversy exists among the various insurance company as to their respective liabilities for payment of a claim of Richard D. Carter against Minnesota Mining Company and Neil Company (the insureds under the various policies) in the sum of $50,000, which claim was settled for the sum of $22,320.

The jurisdiction of the United States District Court is based upon Sections 1332 and 1391 of the Judicial Code, Title 28 of U. S. C. A. The jurisdiction of this court is based upon the provisions of the Judicial Code, 28 U. S. C. A., Section 1291.

Statement of Facts.

On July 10, 1947, the Neil Company and Minnesota Mining Company entered into a written contract under which the Neil Company agreed to construct a roofing granules plant for Minnesota Mining Company in Riverside County, California, on a cost plus basis. [The agreement is Pltf. Ex. 4; R. p. 191, *et seq.*] In that contract, Minnesota Mining Company is referred to as owner and Neil Company is referred to as contractor. The contract provides in part that the drawings, plans and specifications for the roofing granules plant be prepared by the contractor (Art. 1); that the owner shall have the right to amend, add to or change such drawings, plans and specifications from time to time during the progress of the work (Art. 3); the contractor agrees to provide all labor, transportation and material (Art. 4); the contractor

is to be paid on a cost plus basis, and there shall be included in cost the amount actually paid by the contractor for the rental from third persons of equipment (Art. 5(g)); that the owner reserves the right to perform such work as it may deem necessary or expedient and such amount shall not be included as a cost of the contractor (Art. 8); the contractor agrees to indemnify and hold the owner harmless because of any claim arising out of injury to any person in connection with the work (Art. 17); the contractor shall maintain public liability insurance for liability arising out of death or injury to any person in connection with the contract work (Art. 18, Sec. b); and the contractor shall maintain automobile public liability insurance on all motor vehicles engaged in operations under the contract whether on or off the site of the work to be performed thereunder (Art. 18, Sec. c).

Under date of September 30, 1947, Minnesota Mining Company entered into an "agreement for electric service involving line extensions" with California Electric Power Company for the area on which the roofing granules plant was being constructed [Deft. Ex. A; R. p. 425], as there was no electricity available on this site either for the construction or operation of the roofing granules plant [R. p. 231]. Under date of September 16, 1947, Minnesota Mining Company gave to California Electric Power Company an easement in gross for the construction, maintenance, operation, inspection, repair, replacement and removal of electric lines and cables upon, over and across the property owned by Minnesota Mining Co. upon which the roofing granules plant was being constructed [Deft. Ex. B; R. p. 429]. This easement in gross was recorded in Riverside County on September 30, 1947.

As required by Article 18, Section b, of the contract between the Neil Company and Minnesota Mining Company [R. p. 204], the Neil Company took out public liability insurance with Pacific for the period from November 1, 1947, to November 1, 1948 [Pltf. Ex. 6; R. p. 39 ff.].

As required by Article 18, Section c, of the contract between the Neil Company and Minnesota Mining Company, the Neil Company took out automobile public liability insurance with Hartford for the period October 3, 1947, to October 3, 1948 [Pltf. Ex. 5; R. p. 23 ff.].

The Pacific policy provided a limit of liability of $50,000 for each person [R. p. 40]. By coverage A, it agrees to pay on behalf of the insured, subject to the exclusions and limitations stated in the policy, all sums which the insured shall become obligated to pay by reason of liability imposed upon it by law or assumed by it under written contract for damages because of bodily injury sustained by any person.

Under Exclusions, the Pacific policy provides:

> "This policy does not apply: (a) except with respect to operations performed by independent contractors, to the ownership, maintenance, or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or controlled by the insured . . ." [R. pp. 43 and 44.]

Regarding other insurance, Section 11 of the Pacific policy provides:

> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated

in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss." [R. p. 50.]

Regarding the rights of subrogation, Section 12 of the Pacific policy provides:

"In the event of any payment under this policy, the company shall be subrogated to all of the insured's rights of recovery therefor against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights." [R. p. 50.]

The Hartford policy provides for a limit of liability of $50,000 for each person [R. p. 23]. By Coverage A, it agrees to pay on behalf of the insured, subject to the exclusions and limitations stated in the policy, all sums which the insured shall become obligated to pay by reason of liability imposed upon it by law for damages because of bodily injury sustained by any person and arising out of the ownership, maintenance or use of any automobile [R. p. 35].

Article III of the Hartford policy defines "insured" as follows:

"The unqualified word 'insured' includes the named insured and also includes . . . (2) under Coverages A and C, any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured . . ."

Section 3 of the Hartford policy defines certain terms as used in the policy and subsection (b) defines "use of an automobile" as follows:

> "Use of an automobile includes the loading and unloading thereof." [R. p. 36.]

Section 3, subsection (b) of the Hartford policy defines a "hired automobile" as follows:

> " 'Hired automobile' shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the name insured who is granted an operating allowance of any sort for the use of such automobile.
>
> 'Non-owned automobile' shall mean any other automobile." [R. p. 36.]

Regarding other insurance, Section 13 of the Hartford policy provides:

> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise." [R. p. 36.]

At the time of the accident to Richard D. Carter, the employees of the Neil Company and their connections with the project were:

William P. Neil, President of the Neil Company, came upon the premises and inspected the progress of the installations from once every two weeks to once a month [R. p. 403].

David H. Archibald, Vice-president of the Neil Company, was on the project every three or four days during the early part of it, and at the latter part of it, sometimes every day and other times every other day [R. p. 400]. His main work was to go over the project with A. L. Nienaber, resident engineer on the project for the Minnesota Mining Company, and discuss Mr. Nienaber's suggestions as to changes on the job.

Andrew L. Jensen was superintendent for the Neil Company on this project [R. p. 307].

W. L. Crockett was general labor foreman on the job for the Neil Company [R. p. 170]. Robert C. Grace was labor foreman under Crockett [R. p. 171]. Hubert D. Jones was in charge of the operators of the dump trucks and other equipment [R. p. 370].

The employees of the Minnesota Mining Company in charge of the project on its behalf were:

Walter E. Vroman, division engineer for Minnesota Mining Company, visited the project about every four weeks [R. p. 221].

A. L. Nienaber was the resident engineer for the Minnesota Mining Company on the project [R. p. 221]. He had a construction shack about 400 feet from the job site where he resided and made daily inspections of the

job [R. p. 235]. His work consisted of making suggestions on behalf of the Minnesota Mining Company for changes in the construction work as it was being performed by the Neil Company. These suggestions were as to the schedule of the work to be done [R. p. 398], flow of equipment onto the premises [R. p. 397], number of employees to be placed on the job [R. p. 401], speed of the work [R. p. 405], and the proper water-cement ratio in the construction [R. p. 250].

Mr. Nienaber also had an auditor who stayed on the job with him [R. p. 234].

The employees of California Electric Power Company in charge of performance of its contract with Minnesota Mining Company for electric service for the project were:

Avery W. Briggs was commercial agent for the power company in the area and, as such, conferred with Minnesota Mining Company on the selection of the site for the substation on the property of the Minnesota Mining Company [R. p. 434].

Robert A. Speer was electric substation construction superintendant for the power company [R. p. 441], and scheduled the crews of the power company to go in and put in the substation [R. p. 441].

Reginald R. Fry was in charge of the cement work in connection with constructing substations for the power company and was in charge of the crew which employed Richard D. Carter [R. p. 347].

The record is not entirely clear on when the Neil Company commenced construction under this project, but their Vice-President, David H. Archibald, estimates it was about August or September of 1947 [R. p. 388].

California Electric Power Company apparently commenced its work after recording its easement in gross and after signing its agreement for electric service on September 30, 1947. It first conferred with Nienaber, Vroman and another employee of the Minnesota Mining Company concerning the proper location of the substation on the Minnesota Mining Company property [R. pp. 432 and 433]. At that time, the work of the Neil Company was already in progress [R. p. 433]. The California Electric Power Company then submitted drawings for the substation to the Minnesota Mining Company [R. p. 435], and eventually Briggs, of the California Electric Power Company, determined that the site was sufficiently prepared so that his company could send in its crew to begin work [R. p. 437].

The California Electric Power Company did not consult with the Neil Company with respect to when it should send in its crew. This decision was made by the construction department of the California Electric Power Company [R. pp. 437 and 443].

The installation of the granules plant being a cost plus job, it was to the advantage of Minnesota Mining Company to furnish any equipment which it could on the project to the Neil Company in order to reduce the cost of the overall job [R. pp. 219 and 220]. Therefore, the Minnesota Mining Company and the Neil Company entered into an oral agreement that the Neil Company would use such equipment as the Minnesota Mining Company had available and would be fully responsible for its maintenance and proper operation [R. p. 220]. Among the various pieces of equipment which Minnesota Mining Company furnished under this agreement, were two Euclid dump trucks [R. p. 219].

One of the jobs which the Neil Company was required to do on the project, as a part of its cost plus contract, was to prepare the site for the California Electric Power Company's substation [R. p. 437]. The site of the substation was on a hill and it was necessary to cut into the hill to make a level site for the substation and then to put up a retaining wall where the hill was dug away to prevent the cut away hill from sliding down upon the substation area [R. p. 143]. After the retaining wall had been constructed, it was necessary to backfill it [R. p. 147].

The two Euclid trucks owned by Minnesota Mining Company were used by the Neil Company in making this back-fill. An employee of the Neil Company by the name of Robert A. Walker operated one of the Euclid trucks and another employee of the Neil Company by the name of Robert Foxx operated the other one.

Prior to November 18, 1947, the day on which Richard D. Carter was injured, Walker and Foxx had been back-filling behind the retaining wall for about a week [R. p. 179]. The procedure was to drive the dump trucks to an excavation a little distance away, but still on Minnesota Mining Company property, where decomposed granite was loaded into the dump trucks. Then the trucks would back up a small hill to the point where the retaining wall was being back-filled [R. p. 149]. The truck would then be parallel with the wall [R. p. 150].

Every day that there was back-filling, there was always a flag man there [R. p. 166]. The flag man on the day in question was V. O. Ford [R. p. 149]. He would stand between the dump truck and the wall on the driver's side of the truck. Mr. Ford kept a four foot lath in his

hand, and the driver of the truck, as he backed up, leaned out of the truck and noted where Mr. Ford placed the end of his lath. That indicated where he wanted the truck to dump [R. p. 151]. During the morning of November 18, the trucks were dumping three to four feet away from the wall [R. p. 151].

The back-filling did not go on continuously each day. The night of November 17, 1947, Grace was directed by Crockett or Jensen to start back-filling the next morning [R. p. 178]. On November 18, Grace directed Ford to act as flagman and Jones directed Walker and Foxx to drive the dump trucks [R. p. 180].

That same day, November 18, 1947, California Electric Power Company scheduled its concrete form crew to come in and make the forms for the foundations for the substation. Each company—the Neil Company and the California Electric Power Company—was acting independently of the other [R. pp. 437, 443, 315, 316 and 241], and California Electric Power Company was acting without direction or control by Neil Company [R. pp. 437, 443, 315, 316] or Minnesota Mining Company [R. p. 241].

During the morning of November 18, 1947, Walker and Foxx hauled possibly ten or twelve loads of decomposed granite to fill in behind the wall which formed one side of the substation [R. p. 148]. Also, during the morning of November 18, 1947, Reginald R. Fry, foreman for the California Electric Power Company and his

four employees, came upon the location for the substation for the purpose of building forms [R. p. 348]. During the morning, they worked back from the wall because of the back-filling behind the wall [R. p. 352]. In the afternoon, up until the time of the accident, Fry and Carter worked at the base of the retaining wall three or four feet from it [R. p. 356].

As to what notice the employees of California Electric Power Company gave to the employees of the Neil Company to stop back-filling and what notice the employees of the Neil Company gave to the employees of California Electric Power Company to cease working on the substation until the back-filling was completed, there is a complete diversity of testimony, as follows:

Fry (California Electric Power Company foreman) testified that no one from the Neil Company ever told them that they should not be working at the substation [R. p. 353]. He further testified that Ford, the flagman for the Neil Company, told him that the Neil Company was not going to back-fill behind the retaining wall on the afternoon of November 18 [R. p. 356].

Jensen (Neil Company superintendant) testified that the first time the California Electric Power Company crew came, he told them that they were premature and that they worked around there awhile and then left; the second time that they came around, he did not tell them to leave [R. pp. 317-319]. He further testified that the foreman from the power company came to him and told

him that the back-fill was getting pretty close to the top of the wall and Jensen stated that he would send Grace to clarify the situation [R. p. 320], but that Grace may have stopped a half dozen times before he got there [R. p. 320].

Grace (Neil Company foreman) testified that he told Fry to keep his men out of there for an hour and one-half to two hours until we got our dirt in [R. p. 182]. He did not testify that Jensen had sent him up to the back-fill to clarify the situation, but he did testify that after the accident, Jensen asked him if he hadn't received his message cutting the back-fill off and Grace replied he had not [R. p. 185].

The load of decomposed granite which caused the injury which resulted in Carter's lawsuit and this action for declaratory relief was in a Euclid truck operated by Walker. He backed the truck up to the back-fill in the usual manner, parallel to the wall, and leaning out of the truck on the wall side to see where he was backing and to see where Ford, the flagman, was indicating the truck should be stopped and dumped. This was the second load after lunch [R. p. 156]. Before the load was dumped, Walker asked Ford to look over the wall to see if any of the men were working below as he had seen some men coming out from around the wall on the last load [R. p. 155]. Walker does not know definitely whether Ford went over and looked over the wall or not, but he assumed that he did [R. p. 456]. Ford told Walker to dump the load. As he did so, he saw a few rocks go over the

side of the wall [R. p. 157]. One rock about 60 to 90 pounds in weight struck Richard Carter as he worked below [R. p. 148].

On November 16, 1948, Carter commenced action in the Superior Court of the State of California in and for the County of Riverside against Minnesota Mining Company, the Neil Company and various John Does seeking damages which he alleged resulted from the accident in the sum of $53,534.72 [R. pp. 69, 74 to 80].

On March 18, 1950, this action for declaratory relief was filed by Hartford. On January 15, and 17, 1951, Hartford and Pacific entered into an agreement which is Plaintiff's Exhibit 1 [R. p. 132 ff.], which provided in essence that Hartford is given authority to make a settlement of the case of *Richard D. Carter v. Minnesota Mining Company, Neil Company, et al.,* and the rights of the two contracting parties, Hartford and Pacific are protected as follows:

(1) Settlement and payment of the claim of Richard D. Carter shall not be with prejudice to any of the rights under the policies of Hartford and Pacific.

(2) Upon the adjudication in the declaratory relief action of the liabilities of the parties under their several policies that they will immediately pay in accordance with the adjudication any sums that they would have been required to pay had that adjudication been had before judgment in the case of *Carter v. Neil* [R. p. 135].

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(3) All of the rights of the parties under their respective policies are preserved.

On or about February 4, 1952, Hartford and Pacific together with the other two insurance companies originally involved in the action, entered into a stipulation of facts which provided in part as follows:

That on November 18, 1947, Richard D. Carter was injured while working on the premises of the Minnesota Mining Company when struck by a rock which was dumped off a truck while the same was being unloaded; that an employee of the Neil Company was driving the truck and another employee of the Neil Company was on the ground taking part in the unloading operation.

That early in 1951, the tort action of Richard D. Carter was settled for $22,320, one-half of such sum being paid by Hartford and the other half by Pacific, each reserving, by contract, all the rights against the other to abide the outcome of the declaratory relief action [R. pp. 68 to 73].

Questions Involved.

(1) Is the Hartford insurance primary insurance and the Pacific insurance secondary insurance so that Hartford is primarily liable for payment up to the amount of its policy limits?

(2) Did the Neil Company have control of the premises as required in order for the automobile provisions of the Pacific policy to be applicable?

ARGUMENT.

I.

The Hartford Insurance Is Primary Insurance and the Pacific Insurance Is Secondary Insurance.

A. The Hartford Policy Extends Its Coverage to Employees "Using" the Automobile.

The only insured under the Pacific policy is the named insured—the Neil Company. The Hartford policy, on the other hand, by Section III defines the word "insured" to include not only the named insured—the Neil Company—but also under Coverage A, "*any person* while *using* an owned automobile or a *hired* automobile, . . . provided the actual use of the automobile is with the permission of the named insured . . ." [R. p. 35].

By Section 3 of the Hartford policy, use of an automobile includes the loading and unloading thereof [R. p. 36].

B. The Negligent Dump Truck Operator and Flagman Were "Using" the Automobile.

The court below found "that it is true that the driver of the automobile truck belonging to the Mining Company, and operated by the contractor's employee, was negligent in his operation of the truck and the dumping of it, and it is further true that the flagman who was assisting in the operations of the truck telling the truckdriver where to dump and when to dump and when to stop was negligent in directing the said truckdriver, that it is true that the negligence of the said truckdriver and of the said flagman were proximate causes of the accident

and injuries to Richard D. Carter" [Finding XVIII, R. 115].

The findings of the court above quoted were not disputed by either the plaintiff or defendant as shown by the following quotation from pages 444 to 446 of the Record:

"The Court: Have you looked, Mr. Dunn, at this submitted list of issues of fact?

Mr. Dunn: I have, your Honor.

Mr. Brewer: As to number 2 we agree, your Honor, that there was negligence on the part of the flagman.

The Court: Of course, you have conceded the flagman was negligent.

Mr. Brewer: Yes.

Mr. Dunn: Yes, we have.

Mr. Brewer: We both have.

Mr. Brewer: I don't think that you could ever say that the words 'use of automobile' included a flagman in this case, that he was using the automobile.

The Court: But you can certainly say it as to the driver.

Mr. Brewer: Oh, yes, as to the driver, there is no question.

The Court: All right.

Mr. Brewer: All right, I would have to admit that, your Honor.

Mr. Dunn: If it is agreed that the activities of the admittedly negligent flagman come within the scope of the 'loading and unloading' which is within the meaning of 'use,' then we have no issue of fact, because it would be moot, one of those two persons being admittedly negligent.

Mr. Brewer: Counsel, may I ask you—I don't think that the word 'use' of automobile is defined in any way in the Hartford policy.

Mr. Dunn: I think it is.

Mr. Brewer: I don't know, I certainly have looked for it.

Mr. Dunn: That is under 'Definitions,' Subparagraph (b), unless I have the wrong one here, the paragraph numbered arabic 3, subparagraph (b), 'Automobiles. The word "automobile" shall mean a land motor vehicle'—'use of an automobile includes the loading and unloading thereof.'

The Court: Yes, it says, 'use of an automobile includes the loading and unloading thereof.' It is at the end of the first paragraph of (b). The first sentence just after it says '"owned automobile"' shall mean '—

Mr. Brewer: Oh, yes, I see. He is right, your Honor.

The Court: Well, I have your point in mind, but I am going to let you submit briefs.

Mr. Dunn: I was going to ask, your Honor, if Mr. Brewer would concede that the activities of the admittedly negligent flagman came under the heading of 'loading and unloading,' there would be no issue of fact for the court to decide with respect to the driver's negligence.

Mr. Brewer: Let me think what you are saying.

The Court: Do you concede the law he argues for, that the flagman who was assisting in the unloading of a dump truck comes within the use of the term 'unloading and loading'?

Mr. Brewer: Well, in view of that phraseology, I am afraid I would have to."

It was therefore admitted, and the court found in accordance with such admissions:

(1) that both the flagman, Ford, and the dump truck operator, Walker, were negligent and that their negligence proximately contributed to the injuries to Richard D. Carter, and

(2) that such negligence of both the flagman and the dump truck operator was in unloading an automobile.

From the above admissions and findings, it must be concluded as a matter of law, that the negligent flagman and dump truck operator were: (1) "using" an automobile within the definition of that term as set forth in Section 3 of the Hartford policy, and (2) that the flagman and the dump truck operator were both insureds within the definition of "insured" as set forth in Section III of the Hartford policy.

C. The Line of Cases Commencing With United Pacific Ins. Co. v. Ohio Casualty Ins. Co. (9 Cir.), 172 F. 2d 836, Is Controlling That the Insurance Carrier Extending Coverage to the Negligent Employee Is the Primary Insurance.

The facts of the instant case place it squarely within decisions of the Courts of Appeals for the Ninth Circuit and for the Second Circuit and the District Court for the Northern District of California, holding that the insurer that extends its insurance to cover the negligent employee is primary insurance, while the insurer which covers only the employer of the negligent employee is secondary insurance. (*United Pacific Insurance Co. v. Ohio Casualty* (9 Cir., 1949), 172 F. 2d 836; *U. S. Fidelity and Guaranty Co. v. Church* (N. D. Cal. 1952), 107 Fed. Supp. 683; *Maryland Casualty Co. v. Employers*

Mutual Liability Co. of Wisconsin (2 Cir., 1953), 208 F. 2d 731.)

United Pacific Ins. Co. v. Ohio Casualty Ins. Co. (supra) was an action for declaratory relief to declare the rights and liabilities of the two named insurance companies under their respective policies. Ohio Casualty Co. issued its comprehensive liability policy to a partnership composed of McKeon and Page, doing business as Pacific Cleaners. United Pacific Insurance Co. issued its comprehensive policy to Page individually and doing business as Mission Linen Supply Co. and by definition of "insured" extended its coverage to persons driving the automobiles with Mission's consent. Gilbert, an employee of Pacific Cleaners, was driving the truck with the permission of Page, doing business as Mission Linen Supply Co., and was involved in an accident in which one Echols was injured.

As to Gilbert, the driver whose negligence caused the accident, only one policy covered *his* liability—the policy of United Pacific Insurance Co.

At page 840, the court states:

> "The theory of Ohio is that if the negligence of Gilbert caused a loss to Pacific which in turn caused a loss to Ohio due to its liability to defend Pacific in the Echols' case, then Ohio would be entitled to a declaratory judgment establishing the primary and ultimate liability of Gilbert for Echols' claim and further authorizing Ohio to recoup its loss from Gilbert, an insured of United, and thereafter the liability would ultimately fall on United . . . and since the purpose of this action is to finally establish the respective rights of the two companies, it was proper for the court, under the facts of this case, to declare

and fix the liability of United for the tort of Gilbert in order to avoid a multiplicity of actions."

The court in footnote 5, then goes on to say:

"An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee. See *Johnson vs. City of San Fernando,* 35 C. A. (2) 244, 246, 95 P. (2) 147; *Myers vs. Tranquility Irr. Dist.,* 26 C. A. (2) 385, 389, 79 P. (2) 419."

The court in the opinion, at page 841, then goes on to state:

"Ohio contends that the recoupment rule announced in the cases cited in Footnote 5 would also apply where *a reasonable and necessary settlement is made.*" (Emphasis the court's.)

At page 845, the court states:

"We agree with Ohio that this case involves no problem of prorating insurance, but rather presents the question of who carries the insurance on the ultimately liable single tort feasor—Gilbert."

We believe that the *United Pacific v. Ohio Casualty* case lays down the following rules of law:

1. That the insurer which extends its policy to the negligent employee is primary (Op. p. 840).

2. That a judgment against the negligent employee is not a condition precedent when all of the essential facts establishing the negligence of the employee were stipulated (Op. p. 841).

3. That no issue of contribution between joint tort feasors is involved because in an action of the employer

against the employee, the negligence of the employee is not imputable to the employer (Op. p. 841).

4. That the court could declare the ultimate and therefore primary liability of the insurer with "extended insured" provisions without requiring the insurer without "extended insured" provisions to proceed to judgment against the negligent employee (Op. Br. pp. 841 and 848).

5. The "other insurance" clauses of the respective policies cancel each other out (Op. p. 845).

6. The decision is not contrary to California law as there is no "double insurance" on the employee ultimately liable (Op. p. 844).

United States Fidelity and Guaranty Co. v. Church (supra), was an action for declaratory relief to declare the liability of two insurance companies under their respective policies. Briefly, the facts showed that Thomas Rigging Co. was the owner of a truck which was being used to deliver a girder. The unloading was handled by Headrick & Brown, a co-partnership, acting by its employee, Goff. Goff negligently allowed the girder to shift, thereby injuring Church. Church brought suit in the California State Court and judgment was entered against Headrick & Brown and Goff.

U. S. Fidelity and Guaranty Co. had a liability insurance policy on Headrick & Brown. Canadian Indemnity Company had an automobile insurance policy on Thomas Rigging Co. with extended coverage insuring any person "using" such automobiles with the permission of the insured. Unloading was defined by the policy as constituting "use" of the automobile.

Analyzing these facts, the court, at pages 687 and 688, states:

> "On the basis of the foregoing, it is clear to the court that Goff was an insured under the Canadian policy . . . On the other hand, Goff is not an insured under the U. S. Fidelity and Guaranty policy to Headrick & Brown since it insured only partnership risks."

Under these facts, the court held that Canadian Indemnity Company was ultimately liable and was therefore the primary insurance, and at page 688, states:

> "The theory behind this decision is that Headrick & Brown had a clear right of action to recover from Goff the sums necessarily expended in payment for his torts, 'and in an action for that purpose, no issue of contributions between tort feasors would be involved—this because in such an action the negligence of the employee is not imputable to the employer (in California). An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee.' *United Pacific Ins. Co. v. Ohio Casualty Ins. Co.,* 172 Fed. (2d) 841, citing *Johnston v. City of San Fernando,* 35 C. A. (2) 244; see also, *Popejoy v. Hannon,* 37 Cal. (2) 484, 231 Pac. (2) 484; *Spruce v. Wellman,* 98 C. A. (2) 158, 219 Pac. (2d) 472 . . . Under the rule of the United Pacific case, there is no problem of contribution where the person *ultimately liable* is insured under but *one* policy, and so the 'other insurance' clauses are completely irrelevant to this decision." (Emphasis added.)

Again at page 688, the court states:

> "Canadian and U. S. Fidelity and Guaranty are jointly obligated to satisfy any judgment rendered against Headrick & Brown . . . *Headrick & Brown is thus in the position of being doubly insured, Consolidated Shippers vs. Pacific Employers,* 45 C. A. (2) 288, 114 Pac. 2d 34, and . . . *if Goff were uninsured,* Canadian would have no answer for the excess, if any, within the limits of its policy, however, as Goff—the ultimately liable tort feasor—*is* insured by Canadian, *and Canadian alone,* that company is obligated to respond to and satisfy any judgment rendered against Goff and is also obligated to reimburse U. S. Fidelity and Guaranty for all expenditures reasonably and necessarily made to or on behalf of Church in satisfaction of the judgment recovered by Church." (Emphasis added.)

The most recent case on the point is *Maryland Casualty Company v. Employers Mutual of Wisconsin (supra),* in which the opinion of the court is given by Judge Learned Hand, reversing the decision of the lower court.

The opinion of the lower court (112 Fed. Supp. 272) sets forth the facts as follows: Maryland Casualty Co. issued an auto policy covering the Smedley Co. of Hartford and any driver operating its motor trucks with the consent of the Smedley Co. Employers Mutuals issued a comprehensive general liability policy covering the Smedley Co., but excluding insured's liability with respect to automobiles away from the premises owned or rented or controlled by the named insured, or the ways immediately adjoining. The accident took place in the driveway leading out of the Smedley Co.'s premises. Under these facts, the Employers Mutuals refused to defend contending (1) that the accident did not occur on the ways immediately

adjoining the premises of the insured, and (2) that its liability was secondary and that of the Maryland Casualty primary. The lower court held against the Employers Mutuals on both points.

The Court of Appeals in reversing the District Court, stated, at page 732:

> "We shall try to show that to allow the plaintiff to recover any part of the payment, made in settlement of this action, would result in a circuity of action. It is indeed true that, having paid the loss, it becomes subrogated to the Smedley Company's right under the defendant's policy; but, if the defendant had paid to the plaintiff one-third of the loss, it too would in turn have been subrogated to any rights of the Smedley Company by virtue of the subrogation clause in its own policy. One of the rights of the Smedley Company would have been to throw the loss on Amendola for in Connecticut, as elsewhere, an employer who has been forced to pay a loss because of his imputed liability for the negligence of his servant, may recover from the servant upon the servant's default in his duty to conduct the work with reasonable care. The doctrine that there is no contribution or indemnity between joint tort feasors does not apply when the liability of one of them is not for a personal fault, but because the personal fault of the other is imputed to him. Therefore, after paying the plaintiff a third of the settlement, the defendant, as surrogate of the Smedley Company could have obtained a judgment for the same amount against Amendola, the driver; and if Amendola had paid this claim, he could have recovered it from the plaintiff under his policy of insurance. That would have been a complete circuity of action."

The court, at page 733, then goes on to point out that the negligent employee would not have to pay the loss since the Maryland Casualty policy by its terms agreed "to pay on behalf of the insured all sums which the insured shall become *legally obligated to pay* as damages . . . sustained by any person . . . arising out of the . . . use of any automobile." (Emphasis added.)

Similarly, in the instant case, the Hartford policy agrees "to pay on behalf of the insured all sums which the insured shall *become obligated to pay* by reason of the liability imposed upon him by law for damages . . . and arising out of the . . . use of any automobile" [R. p. 35, Coverage A of Policy].

In California where the indemnitor engages to save indemnitee from liability, liability is established upon the rendition of a judgment against the indemnitee with respect to the thing indemnified although the judgment remains unpaid. (*Alberts v. American Casualty Co.*, 88 Cal. App. 2d 891, 200 P. 2d 37; *Tunstead v. Nixdorf,* 80 Cal. 647 at 651, 22 Pac. 472.)

Furthermore, in California the law is the same as the provision of the Connecticut law quoted by Judge Hand: Under California Statutes of 1919, page 677, an injured person who obtains a judgment against an insured automobile owner which is unsatisfied may bring an action against the insurer for the amount of said judgment. (*Langley v. Zurich General Accident and Liability Insurance Co.,* 97 Cal. App. 434.)

Judge Hand concludes at page 733:

> "Thus, since the Smedley Company could have collected from the plaintiff directly any payment it made of a judgment against it in favor of Dachene's Ad-

> ministrator, this defendant could have done the same; and so, on any view, it would result in a circuity of action to allow the plaintiff to recover in the action at bar."

Similarly, in the instant case, the Neil Co. could have collected from Hartford for any judgment rendered against it because of the negligence of its employees and Pacific could have done the same.

The above cases would apparently control and dispose of the instant case. The court below, however, in its Memorandum of Opinion and in its Conclusions, sought to distinguish the instant case from the line of authority above cited. We will, therefore, take up each of the points on which the court below endeavored to distinguish the instant case from the above authorities and will seek to show that the points on which the instant case was distinguished are not legally sustainable.

D. The Finding That Supervisory Employees of Neil Co. Were Negligent Does Not Distinguish the Instant Case From United Pacific Ins. Co. v. Ohio Casualty Ins. Co.

The court below decided that the case of *United Pacific Insurance Company v. Ohio Casualty Company, supra,* was not controlling in the instant case because of its finding that supervisory employees of the Neil Company, as well as the non-supervisory employees, were negligent and such negligence was a proximate cause of the injuries to Richard D. Carter. This position of the court below is set forth in its Memorandum of Opinion, Section 5 [R. p. 104], as follows:

> "The court finds that negligence of the Neil Company was a proximate cause of injury to Carter, *i.e.,*

acts and omissions of its supervisors or employees under its supervisorial charge other than the truck driver:

(1) In the management of loading and dumping operations;

(2) But, not as to the safety of the place furnished for Carter in which to work."

In its findings, the court below found that the supervisorial employees were negligent in the management of loading and dumping operations which contributed proximately to the accident and injuries of Richard D. Carter, and this "would bar any action of the defendant against the said truck driver and the said flagman . . . for the reason that the defendant could not subrogate against said employees of the Neil Company by virtue of any subrogation rights under their policy for the reason that said Neil Co. in whose name and by whose assignment they were suing was thereby guilty of negligence proximately causing the accident, other than the acts of the truckdriver and the flagman of the truck and they would be in *pari delicto* and would be subject to the defense of contributory negligence" and would be in effect asking for a total contribution from one joint tort feasor to another [Finding XXV, R. p. 120]. The supervisorial employees which the court below found to be negligent were Robert C. Grace, Labor Foreman over the flagman, Hubert D. Jones, in charge of the truck drivers, and Andrew Jensen, General Superintendent of the Neil Company [Finding XXIII, R. p. 118].

It is the position of the appellant on this point: (1) that there was no negligence on the part of the supervisorial employees of the Neil Company, and (2) that if

there were negligence on the part of the supervisorial employees of the Neil Company, such negligence was not the negligence of the corporation itself, nor was it a corporate act, and the liability of the Neil Company, because of the negligence of its employees, both supervisorial and non-supervisorial, would exist only under the doctrine of *respondeat superior*.

First, we will address ourselves to the question of whether any of the supervisory employees were negligent in connection with the back-filling of the substation site retaining wall. A flagman was assigned for every load that was dumped [R. p. 166]. The flagman stood between the wall and the place where the decomposed granite was dumped as back-fill; thus, he could indicate a dumping point a safe distance from the retaining wall and he could easily ascertain whether any one was working below before directing that the truck be dumped [R. p. 151]. It must be remembered that the Neil Company had no control over the California Electric Power Company crew as to *when* it would come upon the substation site or *where* it would work upon the site. Under its cost plus contract, the Neil Co. was in a position where it had to complete such work as it was required to perform on the substation site without any control over the scheduling of the California Electric Power Co. crews on the same site [R. pp. 437, 443, 315, 316 and 241]. Under these circumstances, it is submitted that the supervisory employees did everything that they were reasonably required to do when they placed a flagman at the site to make certain that the trucks would be dumped at a point and a time that would not endanger others.

Addressing ourselves to the second point, it is the position of appellant that if there was any negligence on the part of the supervisorial employees of the Neil Company, this was in acts of omission and not acts of commission.

If there was any negligence on the part of the superintendent Jensen, it was in his failure or *omission* to make certain that the man whom he sent to the site "to clarify the situation" went up there immediately and didn't stop en route [R. p. 320].

If there was any negligence on the part of the foreman Grace, it was in his failure or *omission* to check on the dumping crew often enough [R. p. 180].

The record does not disclose any activity of Jones which could be labeled as negligence in connection with this dumping operation.

It is submitted that if, in fact, there was any negligence on the part of the supervisory employees of the Neil Company, it was in individual acts of omission; such individual acts of omission did not constitute the performance of corporate policy; they were not by any stretch of the imagination the *performance of delegated corporate authority.* Under such circumstances, it is submitted that the corporation is liable for these individual acts of negligent omission only under the same doctrine as its liability for the negligent acts of the flagman and dump truck operator—under the doctrine of *respondeat superior.*

The leading California case on this point is *Bradley v. Rosenthal,* 154 Cal. 420. This case involved the liability of a corporation, Sunset Telephone & Telegraph Company, because of the acts of negligence of an agent in charge of construction—one Rosenthal. Rosenthal was in charge

of constructing telephone pole lines to outlying districts, and one of his duties consisted of selecting the poles. One of the poles collapsed under Bradley, a rigger, injuring him. Bradley brought an action against Rosenthal and Sunset Telephone & Telegraph Company jointly, alleging negligence in the selection of brittle poles for rigging. The jury in the action brought in a verdict exonerating Rosenthal and judgment was entered against the telephone company for the full amount of damages prayed for. The Supreme Court reversing the decision, at page 423, stated:

> "Appellant (the corporation) argues that the evidence establishes without conflict that if it be responsible at all, it is responsible solely because of the relationship of principal and agent found to exist between itself and the co-defendant, Rosenthal; that not one word of evidence tends to establish any direct personal participation, personal knowledge or personal culpability upon its part, or that its employee, Rosenthal, was in any way carrying out its express instructions in the particular matter for the doing of which negligence is charged; that under such circumstances, the employer is liable only because of the rule of law which holds him responsible, as well for the undirected as the directed act of the agent within the scope of his employment; that in such kind of cases where there have been *no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort feasors as the law employs that term.*
>
> The employee's responsibility is *primary*. He is responsible because he has committed the wrongful or negligent act. The employer's responsibility is

> *secondary,* in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has done no wrong, and the principal cannot be responsible if the agent has committed no tort. While no right of contribution exists between tort feasors, whether sued separately or collectively, there exists in the kind of case here presented much more than the mere right of contribution. *The principal who has been obligated thus to pay for unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent."* (Emphasis added.)

In other words, before the corporation itself is responsible for the tort of the employee, other than under the doctrine of *respondeat superior,* it must be a *directed* act; that is, there must be instructions for the doing of the act complained of in *the particular way.*

Applying this law to the instant case, the negligent acts which the court below found proximately caused the injury were (a) the negligence of the dump truck operator and the flagman in not ascertaining whether there were persons immediately below them when the load was dumped, and in dumping it in such a place and manner as permitted a part of it to go over the retaining wall, and (b) the negligence of the supervisory employees in failing properly to supervise the dumping. These acts were not done under "express instructions" to do the acts in this "particlar way," and consequently are not the acts of the Neil Company.

An example of the difference between a directed act of an employee and an undirected act of an employee within the scope of his employment is as follows: Suppose the employer tells a truck driver employee to drive a truck load of merchandise from Los Angeles to San Bernardino and on the way the employee causes an accident because of his excessive speed. The proximate cause of the accident is the excessive speed and this is not a directed act of the employer. Under such circumstances, the employer is liable only under the doctrine of *respondeat superior*. Suppose, on the other hand, that the employer tells the same employee to drive a truck load of merchandise from Los Angeles to San Bernardino and to make the trip within a length of time which requires excessive speed. If an accident then occurs because of the excessive speed, the employee is performing an act in a particular way directed and the employer is liable as a joint tort feasor.

In the instant case, the flagman and the dump truck operator were directed to dump the decomposed granite to back-fill the retaining wall, but the directed act was not the proximate cause of the injury. The proximate cause of the injury was the doing of this act in the scope of their employment in an undirected negligent manner. So far as the supervisory employees were concerned, they were performing corporate policy when on November 17th and 18th, they scheduled the back-fill operation, but this was not a proximate cause of the injury. The proximate cause of the injury according to finding of the court below [R. p. 118], was the failure to properly manage the back-filling operation. As to the Neil corporation itself, this, at most, constituted negligence of its employees the

same as the negligence of the dump truck operator and the flagman.

In the case of *Rannard v. Lockheed Aircraft Corp.,* 26 Cal. 2d 149, suit was brought against Lockheed Aircraft Corp. for malpractice of a doctor employed by it. At page 159, the court states:

> "The doctor was the servant of defendant. The case is the same, therefore, as if the defendant's manager or other agent or employee had inflicted the injuries and the rule of *respondeat superior* applies."

It will be noted that the California cases do not hold the corporation itself liable, other than under the doctrine of *respondeat superior,* because the negligent employee was a manager or in charge of the entire construction project as was Rosenthal in *Bradley v. Rosenthal, supra.* The question is not what is the position of the employee committing the tort, but whether in committing the tort he was carrying out corporate policy.

The California law on the point of the liability of the corporation for acts of its agents and employees can be summed up as follows:

1. When the tort is performed in accordance with the express order of corporate officers or agents carrying out corporate policy, the corporation is a joint tort feasor. Thus, in the case of *McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, where the railroad, acting under instructions from its President, employed guards to break up a strike and directed them to use such force as was necessary, and they assaulted a man not connected with the strike who suffered injuries, it was held that

the employees were acting under orders broad enough to contemplate the use of force upon the strikers or sympathizers and the railroad was liable not under the doctrine of *respondeat superior,* but as a joint participant in the wrongful acts. A similar case is *Benson v. Southern Pacific,* 177 Cal. 777, where the act of the employee in running a railroad train at a negligent rate of speed was done under the rules of the railroad requiring such speed.

2. When the tort by the employee is expressly ratified by the corporation, the corporation is jointly liable. *Jameson v. Gavett,* 22 Cal. App. 2d 646, 71 P. 2d 937; *Davison v. Diamond Match Co.,* 10 Cal. App. 2d 218 at p. 222, 51 P. 2d 452.

3. When the tort is the undirected act of the employee, who is nevertheless acting within the scope of his employment, the corporation is liable solely under the doctrine of *respondeat superior. Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171; *Tolley v. Engert,* 71 Cal. App. 439, 235 Pac. 651; *Plott v. York,* 33 Cal. App. 2d 460, 91 P. 2d 924; *Freeman v. Churchill,* 30 Cal. 2d 453, 183 P. 2d 4.

An interesting federal case involving whether an act of the President of a corporation was, under the circumstances which existed, a corporate act is *Glens Falls Indemnity Company v. Atlantic Building Corporation,* 199 F. 2d 60. In that case the President of the building corporation committed a battery while driving a company truck to deliver a motor. The insurance company refused to defend on the grounds that the policy did not insure against the wilful acts of the corporation itself.

The court held that the battery was not committed "by or at the direction of the insured." On the question of whether the act of the President was the act of the corporation, the court, at page 62, states:

> "The problem of coverage in each instance must therefore be resolved by ascertaining the extent of the agent's authority and capacity in which he has acted, and *whether his action may be deemed to have been performed with the corporation's knowledge and consent.*" (Emphasis added.)

Section 800 of the California Corporations Code provides that all corporate powers shall be vested in the Board of Directors. All corporate powers must be exercised by the Board or those agents to whom the corporate power has been duly delegated. (Ballantine, "Law of Corporation," 1949 Ed., Sec. 56, p. 77.) In order for an officer or agent to be performing a corporate act, he must be performing acts specifically delegated to him by the Board. It is therefore obvious that while an officer or agent performing an intentional tort may be carrying out corporate policy and performing a corporate act, an officer or agent who is performing a negligent act would under only the most exceptional cases be carrying out delegated corporate authority and performing a corporate act.

So, in the instant case, the action of the supervisory employees in scheduling the back-filling was performed with the corporation's knowledge and consent, and in performance of corporate policy. If the court below had found that the act of scheduling back-filling was a tortious act, then it could logically be concluded that the tort was that of the corporation itself. But, the back-filling was

not a tortious act; the tortious acts of the supervisory employees, as found by the court below, consisted of certain acts of omission—in the *failure* to properly manage the back-filling. The *failure* to properly manage the back-filling was not done with the corporation's knowledge or consent, and was not in furtherance of corporate policy.

It will be noted that the court below specifically found that the Neil Company was not negligent as to the safety of the place furnished for Richard D. Carter in which to work [R. p. 115, last sentence of Finding XVIII].

In other words, the *place* was not inherently dangerous nor did the Neil Company direct any act that would make the *place* a dangerous place for Richard D. Carter to work; the negligence as found by the court below was that of employees in failing to use due care in performing their duties.

In essence, the court's findings that the non-supervisory employees, Walker and Ford, were negligent and that the supervisory employees, Jensen, Grace and Jones, were negligent and that the negligence of all five contributed proximately to the injuries to Richard D. Carter, show only as a matter of law that these five employees were joint tort feasors, and that the Neil Company was liable under the doctrine of *respondeat superior*. None of the acts of negligence found by the court below were acts directed to be done by the corporation. In commiting the acts of negligence, which the court below found proximately caused the injury, none of the employees were carrying out corporate policy. Under such facts and findings, the Neil Company would have a right to recoup its loss against the employee joint tort feasors for any sums which it was required to pay out by virtue of the

injuries to Richard D. Carter. *Bradley v. Rosenthal*, 154 Cal. 420; *Myers v. Tranquillity Irr. Dist.*, 26 Cal. App. 2d 385, at page 389. Rest. of Agency, Sec. 401, p. 914; Rest. of Restitution, Sec. 96, p. 418. There would be no right of contribution as among the five joint tort feasors or by Hartford as the indemnitor of two of them. *Smith v. Fall River Jt. Union Highschool Dist.*, 1 Cal. 2d 331. Pacific, under Section 12 of its policy [R. p. 50], would be subrogated to these rights of the Neil Company. Therefore, in the final analysis, the insurance company which insured the flagmen and the dump truck operator would be responsible for payment, and this irrespective of whether or not there were other employees besides those two who were in the position of joint tort feasors.

E. The Statute of Limitations Had Not Run Against the Right of the Neil Company to Recoup Against Its Negligent Employees.

In endeavoring to distinguish the instant case from the line of cases headed by *Ohio Casualty Company v. The United Pacific Company, supra,* the court found that the right of action of the Neil Company against the negligent employees (and consequently, the subrogation rights of Pacific) accrued on January 27, 1951, when Pacific paid money on a settlement with Richard D. Carter and would have been barred by the Statute of Limitations as contained in Section 340, Subdivision 3 of the Code of Civil Procedure of California, on January 27, 1952, which was before the trial and submission of this action [Finding XXIII, R. p. 119]. From this, the court concluded that the Neil Company has no right of action against the flagman and dump truck operator [Conclusion 5, R.

p. 124] and even though Hartford was the insurer of the flagman and dump truck operator, it was not the primary insurance because the right of action against these employees had ceased to exist.

It is the position of the appellant on this point that the right of the Neil Company to recoup from its negligent employees had not outlawed; that by stipulation of the parties, the court below was required to determine the rights and obligations of the parties as of the date of such stipulation with the very purpose in view that it would not then be necessary to file any additional suits, but that the parties, without further suits, would pay in accordance with the determination of the court declaring the ultimate respective liabilities of the two insurers.

The right of the employer to recoup or indemnify himself for sums paid out because of the undirected tortious acts of the employee is based upon an implied contract of indemnity. See Restatement of Restitution, Sec. 96, pp. 418-419; *Bradley v. Rosenthal* (*supra*) at page 423, where the court quotes from Cooley on Torts as follows:

> "as between the company and its servants, the latter alone is the wrong-doer and in calling upon him for *indemnity,* the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." (Emphasis added.)

By Section 2772 of the Civil Code of California:

> "Indemnity is a *contract* by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person." (Emphasis added.)

The contract between the employer and negligent employee for indemnity is implied (2779 Civil Code of California; 13 Cal. Jur. Supp. 981, Note 10). See also, *Dunn v. Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439. An action upon an implied in law contract is controlled by C. C. P. 339 (1) which prescribes a two-year period, in which the action should be brought. *Crystal v. Hutton,* 1 Cal. App. 251, 81 Pac. 1115; *Bray v. Cohn,* 7 Cal. App. 124, 93 Pac. 893.

From the above cases, it is apparent that the Statute of Limitations on an action by the Neil Company against its negligent employees would have commenced to run on January 27, 1951, the date on which payment to Richard D. Carter was actually made, as set forth in Finding XXIII of the court below, and the Statute of Limitations would not bar such action until January 27, 1953, instead of January 27, 1952, as found by the court in its Finding XXIII. Since this case was tried in the court below on March 12 and March 13 of 1952 [see Record], it is apparent that at the date of trial, the right of action of the Neil Company against its negligent employees was not barred by the Statute of Limitations. The court's findings cannot be based upon facts as they existed subsequent to the taking of evidence as such facts are not before the court.

Declaratory actions have preponderantly equitable affiliations Borchard, Declaratory Judgments, Second Addition, p. 348.) In equity, the rights of the parties are determined as they stood at the commencement of the

suit. (*American Securities Co. v. Van Loben Sels,* 13 Cal. App. 2d 265 at p. 272, 56 P. 2d 1247, 1251.) If there has been a change in the rights of the parties subsequent to the commencement of the suit, equity may determine the rights as of such subsequent time if the changed conditions are judicially before the court by the pleadings and evidence (30 C. J. S. 990). No facts were judicially before the court subsequent to the final taking of evidence March 13, 1952. The judgment was based upon such evidence and nothing subsequent thereto. On March 13, 1952, the rights of the Neil Company against its negligent employees for indemnification had not outlawed.

We also wish to point out that the Statute of Limitations is a personal defense that must be pleaded. The court below cannot presume that the statute would be pleaded by the negligent employees. (*People v. Perris Irrigation Dist.,* 142 Cal. 601, at p. 607.)

At the time of the payment to Richard D. Carter, an agreement was entered into between Hartford and Pacific, and at the time of the trial, this agreement was received in evidence as Plaintiff's Exhibit 1 [R. pp. 132 to 136]. After giving Hartford authority to negotiate a settlement of the *Carter* case, the agreement goes on to state:

> "7. That it is the desire of the parties to this agreement that such negotiations, or payment thereunder in case of settlement, shall be protected from any claim of waiver of the provisions of the policies of the parties. . . .

"It is hereby agreed by the parties that settlement and payment of the said claim of Richard D. Carter against Neil shall not be with any prejudice to any of the rights under the policies of the Hartford and the Pacific.

"It is further agreed that on adjudication in the declaratory relief action of the liabilities of the parties under their several policies or settlement of said declaratory relief action by the parties before then, that they will immediately pay in accordance with the adjudication when the judgment is final or upon such settlement of the declaratory relief action, *any sums that they would have been required to pay had that adjudication or such settlement been had before settlement or a judgment in the case of Carter v. Neil and the mining company.*" (Emphasis added.)

"It is understood that this agreement is intended to preserve all of the rights of each party hereto under their respective policies and under the facts of the case, and is intended to prevent any claim of waiver."

In other words, the parties, by express agreement, stated that they would pay such sums as they would have been required to pay had the declaratory relief judgment been *before* settlement of the case of *Carter v. Neil.* Under such a stipulation, the Statute of Limitations cannot be presumed to have run. The very purpose of the stipulation was to prevent a claim of waiver of rights by the passage of time.

II.

The Neil Company Did Not Have Control of the Premises Within the Meaning of That Portion of the Pacific Policy Providing That It Is Not Applicable to Automobile Accidents While Away From the Premises Controlled by the Insured.

The exclusions in the Pacific policy provided as follows:

> "This policy does not apply:
>
> (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading and unloading, of (1) automobiles while away from the premises owned, rented or controlled by the Insured or the ways immediately adjoining" [R. pp. 44 and 45].

The Pacific policy was not a comprehensive policy so far as automobile accidents were concerned, but was subject to this broad exclusion.

At the time of the accident to Richard D. Carter, the flagman, Ford, and the dump truck operator, Walker, were engaged in unloading the truck in connection with completing the substation site selected for the California Electric Power Company substation. Under its cost plus contract, the work which the Neil Company was required to do in connection with the substation site was to level out the site, put up a retaining wall on the hill side and back-fill behind the retaining wall. This last portion of its duties was being completed on Nov. 18, 1947.

The question then is whether the substation site, where the Neil Company was completing its work by unloading its truck to back-fill the retaining wall constituted prem-

ises "owned, rented or controlled" by the Neil Company. The premises were not owned or rented by the Neil Company so the question narrows itself to: Were these premises "controlled" by the Neil Company?

The premises had been selected by Minnesota Mining Company and California Electric Power Company officials as the site for the California Electric Power Company substation [R. p. 434].

The Minnesota Mining Company had given the California Electric Power Company an easement in gross which permitted them to go upon the premises for construction work in connection with such easement without restriction [R. p. 439], and the court below found that the California Electric Power Company crew was on the premises on November 18, 1947, in the exercise of such easement in gross [Finding III, R. p. 108].

The California Electric Power Company was not a subcontractor of the Neil Company and the Neil Company had no control over when the California Electric Power Company scheduled its crews to come on the premises [R. pp. 437, 443, 315, 316, 241].

The Neil Company put up barricades across the road to keep persons out of the general area owned by the Minnesota Mining Company on which the granules plant was being constructed, but the California Electric Power Company officials and crew went past these barriers at will when its employees or crews were scheduled to go on the premises [R. pp. 437-438 and 441-442].

The California Electric Power Company prepared its own plans for the power station site, including details of the retaining wall [R. p. 435], and when the blue prints of the substation site which the Neil Company

had did not conform to the blue prints for the site that the California Electric Power Company had, the Neil Company changed its blue prints to conform to that of California Electric Power Company [R. p. 351].

On November 18, 1947, the California Electric Power Company crew was on the premises in question, under its own easement, under a schedule it alone had set up, and following blue prints for the substation which it had prepared.

It must be remembered that the Neil Company was building several structures on a large acreage owned by the Minnesota Mining Company [R. p. 231]. In this action, however, only one part of the project is involved—the substation site on which the dump truck was working—and the question is whether the Neil Company controlled those premises.

A general contractor can usually exercise control over a building site where all other contractors are sub-contractors under it. In such instances, it has the right and exercises the authority to schedule the crews in such a manner that the work of one does not interfere with the work of the other, or that the work of one does not endanger the employees of another crew. Such right did not exist in this case.

The fact of the matter is that had the Neil Company had control of the premises, the accident would never have happened. Had the Neil Company had control of the premises, Jensen would have kept the California Electric Power Company crew off the substation site until the back-filling was completed and the site entirely ready. He endeavored to do this once, but the crew stayed on for the rest of the day anyway [R. p. 321].

The second time the California Electric Power Company crew came on, Jensen did not try to tell them to keep off the substation site [R. p. 319].

We can at once see the hazards inherent in this situation. It is Pacific's position that it is precisely such hazards as this that its policy did not intend to insure against so far as automobile insurance is concerned.

From an actuarial viewpoint, it is apparent that the risk of accident and injury is lessened when the insured has control of the premises and the premium is computed and collected on the basis of this lessened risk. Where on the other hand, another has uncontrolled access to and dominion upon the premises for the purpose of doing such work at such time and in such manner as the other person desires, the risk is greatly increased.

The Pacific policy is a comprehensive liability policy as to accidents *other than those resulting from the use of automobiles.* As to accidents arising from the use of automobiles the Pacific policy is a *limited* policy intentionally restricted by the exclusion set forth in Subsection (a).

It must be borne in mind that Pacific's policy was not intended to afford coverage for auto accidents. The Neil Company purchased another policy to cover auto accidents—the Hartford policy—which afforded coverage for auto accidents without exclusion as to the location of the accident, and extended its coverage to employees of the Neil Company engaged in unloading automobiles. The Pacific policy was designed to extend coverage for automobile accidents to a limited situation, namely, an accident occurring on premises which the Neil Company owned, rented or controlled.

The word control must be used in its commonly accepted meaning. The case of *J. S. Spiers & Co. v. Underwriters at Lloyd's,* 84 Cal. App. 2d 603, involved the meaning of the word control in an insurance policy. At page 604, the court states:

> "In Black's Law Dictionary, 'control' is defined as follows: 'power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer or oversee'. In *Rose v. Union Gas & Oil Co.,* 297 Fed. 16, it is defined as follows: 'the word "control" does not import an absolute or even qualified ownership. On the contrary, it is synonymous with superintend, management or authority to direct, restrict, regulate'. (See also, *Dinan v. Superior Court,* 6 C. A. 217, 91 Pac. 806; *McCarthy v. Board of Supervisors,* 15 C. A. 576, 115 Pac. 458; *Coffey v. Superior Court,* 147 Cal. 525, 82 Pac. 75.)"

In the *Speirs* case, the right of "control" of any automobile exempted the occurrence from the provisions of the Board. The court went on to hold that the plaintiff had "control" since it had "complete possession and power and authority to manage the truck."

Regarding the effect of such exclusion, the court, at page 605, goes on to state:

> "As said in Couch's Cyclopedia of Insurance, Volume 2, Section 187: '. . . an insurer ordinarily may insert as many exclusion clauses in its policy as it sees fit, and the courts cannot change terms by judicial construction even in the case of exemptions from liability, if the same are free from ambiguity and uncertainty as to meaning.' "

Watson v. Fireman's Ins. Co., 83 N. H. 200, 140 Atl. 169, involved the meaning of the words "premises over

which the insured has no control" as contained in a fire insurance policy. The question was whether the insured had control of that portion of a barn where the insured's son took his car to put in gasoline. At page 172, the court states:

> "Control of the premises necessarily includes power to determine what acts shall be done upon them. For the time being, such power was lacking. If it be said that the occasion is too transitory, the inquiry at once arises, what period of time would be sufficient? *If the owner has no power to prevent the act, why should he be thought to have control over that portion of the premises when the unpreventable act is done . . .* ? If a permission to occupy an undefined spot on the barn floor, in its owner's absence, does not surrender control of the particular place where the invitee puts his car, how definitely must the space be delimited in the permission?" (Emphasis added.)

A. T. Morris & Co. v. Mutual Casualty, 289 N. Y. Supp. 227, 163 Misc. 715, involved the meaning of the words property "other than in the . . . control of the assured" within the meaning of a public liability policy. The insured was a subcontractor engaged in putting in the air conditioning in the Tivoli Theater in Brooklyn and during the course of the work damaged the ceiling of the theater. The policy applied only to accidents other than on property controlled by the assured. The court held that the insured did not have control and at page 231, states:

> "Possession or control of real property is indicated by an occupation exclusive of the control of anyone else."

Numerous other cases have held that the word "control" implies "authoritative control" or "dominion" or "exclusive control."

In *Cohen v. Keystone Mutual Casualty Co.,* 30 A. 2d 203 (151 Pa. Super. 211), at page 205, the court states:

> "The plaintiff and its employees were simply in the property temporarily for the purpose of doing the work. The control of the property still remained in the owners or lessees thereof."

In *Cohen & Powell v. Great American Indemnity Co.,* 16 A. 2d 354 (127 Conn. 257) at page 355, the court states:

> "A thing is not 'in charge of' an insured within the meaning of the policy unless he has the right to exercise dominion or control over it."

In this respect, see also:

Clark Motor Co. v. United Pacific, 139 P. 2d 570 (Or.);

Speir v. Ayling Pennsylvania, 45 A. 2d 385, 158 Pa. Super. 404;

State Auto Mutual v. Connable-Joest, Inc., 125 S. W. 2d 490 (Tenn);

Aetna Casualty Co. v. Patton, 57 S. W. 2d 32 (Ky.).

In determining the meaning of the exclusion from the Pacific policy: "This policy does not apply . . . to the . . . use, including loading or unloading, of automobiles while away from the premises owned, rented or con-

trolled by the insured . . ." we believe the court should take the following law and facts into consideration:

(1) A strict construction of the word "control" would result in double coverage of the Neil Company—a situation that certainly was not intended by any of the parties. Where a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other which is unreasonable, the latter interpretation must be disregarded and the first accepted. *Cohn v. Cohn,* 20 Cal. 2d 65, 70; *Stein v. Archibald,* 151 Cal. 220, 223; *Coletti v. State,* 45 Cal. App. 2d 302, 305; *Yeremian v. Turlock, etc. Co., Inc.,* 30 Cal. App. 2d 96; California Civil Code Sec. 1643; Restatement, Law of Contracts, Sec. 263(a).

(2) Strict construction cannot be used to nullify the express agreement of the parties, and certainly it should not be so indulged on behalf of a stranger to the policy, namely, the Hartford Co. *Brichell v. Atlas Assur. Co.,* 10 Cal. App. 17, 28; *Finkbohner v. Glens Falls Ins. Co.,* 6 Cal. App. 379, 381.

(3) A strict interpretation of the word controlled would mean that the Neil Company would be paying two premiums to cover a single risk—such is not a construction that is favorable to the insured and should not be indulged in. *Yoch v. Home Mutual Ins. Co.,* 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189.

(4) Control means right of management; its meaning is clear and the policy must be interpreted according to its terms. *Brichell v. Atlas Assur. Co.* (*supra*). Exclusions are to be enforced according to their terms. *Speirs & Co. v. Underwriters at Lloyd's,* 84 Cal. App. 2d 603.

III.

Conclusion.

In conclusion, it is respectfully submitted:

(1) That the acts of negligence of the employees of the Neil Company which proximately resulted in the injuries to Carter were not acts of corporate policy and the Neil Company is liable therefor only under the doctrine of *respondeat superior.*

(2) On the basis of the facts judicially before the court below, the Statute of Limitations had not run against the right of the Neil Company to recoup itself against the negligent employees for sums paid out because of its liability under the doctrine of *respondeat superior,* and by the same token, the subrogation rights of Pacific against the negligent employees had not outlawed.

(3) Under the facts set forth above, the Court in a declaratory relief action will avoid circuity of action and will declare primarily liable that insurer which insures the negligent employees as was done in *United Pacific Ins. Co. v. Ohio Casualty Ins. Co.,* 172 F. 2d 836; *U. S. Fidelity and Guaranty Co. v. Church,* 107 Fed. Supp. 683; and *Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731.

(4) In any case, the Pacific policy is not applicable because the Neil Company did not have control of the premises where the unloading was being performed and this accident would not have happened except for this

inability of the Neil Company to, in *any* manner, control the California Electric Power Company from scheduling crews on these premises when it wanted and doing work thereon when and how it wanted.

Respectfully submitted,

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